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No. 72-163

IN THE

Supreme Court of the United States

October Term, 1972

RAY LEONARD ADKINS,
Petitioner

vs.

KELLY'S CREEK RAILROAD COMPANY,
a corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court's opinion sustaining respondent's motion for summary judgment with regard to the FELA claim is unreported.[1] The District Court's opinion granting judgment n.o.v. is reported in 338 F. Supp. 888, and the affirming opinion of the Circuit Court of Appeals is reported in 458 F. 2d 26.

QUESTION PRESENTED

The question presented is whether this Court will review a decision of a Court of Appeals which applied contract law of West Virginia as enunciated by the Supreme Court of Appeals of West Virginia in *Beall*

[1]See letter opinion John A. Field, Jr., District Judge, dated March 1, 1968, pp. 1A and 2A Appendix to the petition.

v. *Morgantown & Kingwood RR.*, 118 W. Va. 289, 190 S. E. 333 (1937).

STATEMENT

May 8, 1952

Petitioner, hereinafter referred to as "Adkins", while employed as a section hand by respondent, Kelly's Creek Railroad Company, hereinafter referred to as "Kelly's Creek", sustained an injury necessitating the amputation of his left foot and ankle.

The complaint alleges that Adkins did not bring action under the FELA against Kelly's Creek because he accepted an alleged promise made after his injuries by Kelly's Creek Railroad of lifetime employment with Kelly's Creek if he would not bring suit.

December 1, 1952

Adkins alleges he accepted the alleged offer and returned to work on or about December 1, 1952. He continued to work for Kelly's Creek until November 13, 1955.

November 13, 1955

On November 13, 1955 a written termination statement was given to Adkins by Kelly's Creek which he signed, acknowledging receipt thereof. Simultaneously he was employed for general outside work by Warner Collieries Company, a coal mining company, hereafter referred to as "Warner", which was the parent of Kelly's Creek, under terms and conditions which differed materially from his former employment with Kelly's Creek. Kelly's Creek continued to operate the railroad.

Under his new employment with Warner Adkins received a substantial increase in pay, ($18.13 for

7¼ hours work vs. $12.60 for 8 hours). His workday was 45 minutes shorter. He transferred his union affiliation from District 50 United Mine Workers (not a coal miners' union) to Local 404 of District 17 United Mine Workers (a coal miners' union). He gave up his rights under the Railroad Retirement Act, and his seniority with the Railroad Brotherhood as well as his right to a pension in 90 days. He also gained substantial welfare and medical benefits upon becoming a member of the coal miners' union. At no time did Adkins assert to Kelly's Creek or Warner that he had a contract for lifetime employment with Kelly's Creek and therefore could not be terminated as a railroad employee.

1959

In 1959 Warner merged with The North American Coal Corporation and Adkins continued to work for North American until January 29, 1963 when North American discontinued its mining operations. At no time after 1959 did Adkins ask to be returned to Kelly's Creek's payroll, nor did he attempt to bring his alleged contract to the attention of North American until the present action was commenced November 17, 1965. Kelly's Creek continued to operate the railroad from 1959, after the mine closed, until June of 1963 in order to haul coal then being mined from Union Carbide Company's mine on Kelly's Creek under a contract between Carbide and Kelly's Creek.[2]

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[2]From 1959 to 1963 Adkins lived right beside the railroad track. He observed the trains continuing to operate. He knew that he was not working for Kelly's Creek, although the trains were still running. Only employees of Kelly's Creek continued to work while the trains were running. No employee of North American, including Adkins, worked on or for the railroad during this period.

November 17, 1965

This action was instituted in the United States District Court for the Southern District of West Virginia.

ARGUMENT

1. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT

The cases cited in the petition for certiorari are not in point here. Each and every one of them are clearly and completely distinguishable. The instant case is not one where the District Court or the Court of Appeals made any determination regarding the adequacy or sufficiency of the evidence. There is no dispute that Adkins was an employee of Kelly's Creek. There is no dispute that he was injured while at work due to negligence of Kelly's Creek.

Further, as the Court of Appeals so aptly observed, the District Court did not "weigh" the evidence and take the case from the jury. The only question ruled on by the District Court was the question of whether Adkins' contractual rights had been waived by him as a matter of law. The question of Adkins' former rights under FELA was only remotely involved.

The District Court granted judgment n.o.v. on the sole ground that Adkins, by his conduct had waived his right to enforce the contract which the jury had found existed. The Court of Appeals affirmed this opinion.

2. THERE IS NO FEDERAL QUESTION INVOLVED

Neither in the Court of Appeals nor in his petition for certiorari does Adkins challenge the proposition

decided by both the District Court and the Court of Appeals that the acceptance of the alleged offer of lifetime employment by Adkins merged out of existence the FELA claim and thus there was no longer a Federal question before the Court.

The case presented for review in this Court is an effort to have this Court review the holding that under West Virginia law, *Beall* v. *Morgantown & Kingwood RR.*, 118 W. Va. 289, 190 S. E. 333 (1937), Adkins waived his rights under the alleged contract. It is submitted that the question of waiver under these circumstances is not a question of fact for a jury but is purely a question of local law for the court.

3. THERE IS NO QUESTION OF "IMPORTANCE" INVOLVED IN THIS PROCEEDING

This case is not one of those cases in which the Court will grant certiorari because the decision of the Court of Appeals affects the public. It would be a rare case indeed, if a factual situation and a pleading situation such as we have here would again occur. The concept of the "importance" of the issues relates to issues important to the public generally, as distinguished from those which are important only to the parties involved. *Layne and Bowler* v. *Western Well Works*, 261 U. S. 387, 393 (1923); *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 79 (1954).

4. THE DECISION BELOW IS CLEARLY CORRECT

The complaint in this action contained two counts, one for negligence under FELA and the second, a separate claim alleging an offer of lifetime employment in consideration of a promise by Adkins that he would

not sue for his alleged injuries and acceptance by Adkins of the alleged offer.

The two counts are inconsistent in that sooner or later a decision would have to be made by the court as to which theory would be submitted to the jury. The District Court recognized this problem. The Court's logic is clear and convincing. If a valid contract for lifetime employment was made following Adkins' injury in consideration of his forbearance to sue, then Adkins' remedy was on the contract—the FELA claim was settled. The District Court chose this solution pointing out that if in fact no contract was effected, then the subsidiary allegations of the complaint fell because there could not have been any representation by Kelly's Creek upon which Adkins relied.

A jury trial was had on the issue of whether there was a contract for lifetime employment. The jury found for Adkins thus finding that there was a valid and binding oral contract and a breach of that contract.

The District Court in entering judgment for Kelly's Creek n.o.v. and the Court of Appeals had only a single issue before them, namely, whether or not Adkins' conduct in accepting employment by Warner and subsequently by its successor, North American, and in failing to insist upon his alleged contract constituted a waiver of his contractual rights.

The District Court's decision was unanimously affirmed by the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HOWARD R. KLOSTERMEYER
R. PAGE HENLEY, JR.
1101 Kanawha Banking &
Trust Building
Charleston, W. Va. 25301

Of Counsel

PATRICK F. MCCARTAN
JONES, DAY, COCKLEY & REAVIS
1750 Union Commerce Building
Cleveland, Ohio 44115

SPILMAN, THOMAS, BATTLE
& KLOSTERMEYER
1101 Kanawha Banking & Trust
Building
Charleston, W. Va. 25301

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